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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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EXAMINER

CHOI, FRANK I

ART UNIT PAPER NUMBER

1616

DATE MAILED: 03/11/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b> 09/802,425	<b>Applicant(s)</b> RHOADES, DEAN	
	<b>Examiner</b> Frank I Choi	<b>Art Unit</b> 1616	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 20 November 2003.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-3,5,7,21 and 22 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-3,5,7,21 and 22 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 11/20/2003 has been entered.

### ***Claim Rejections - 35 USC § 101/112***

35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1,2,3,5,7,21,22 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The previous amendment was to "less than 125 microns" which was rejected under 35 U.S.C 112, first paragraph, as failing to comply with the written description

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requirement. The current amendment now states “34 to 124 microns”. There does not appear to be any disclosure in the Specification which sets forth the average particle size being 124 microns and Applicant offers no reason why 124 microns was chosen as opposed to some other number. New or amended claims which introduce elements or limitations which are not supported by the as-filed disclosure violate the written description requirement. See, e.g., *In re Lukach*, 169 USPQ 795 (CCPA 1971) (subgenus range was not supported by generic disclosure and specific example within the subgenus range); *In re Smith*, 173 USPQ 679, 683 (CCPA 1972) (a subgenus is not necessarily described by a genus encompassing it and a species upon which it reads). Applicant’s reliance on *In re Wertheim*, 191 USPQ 90 (CCPA 1976) is misplaced. The court in *In re Wertheim* specifically stated that they were not creating a rule applicable to all description requirement cases involving ranges. Further, the ruling in *In re Wertheim* based on the fact there was a specific embodiment of 36% and the minimum of the claimed range was 35%. Applicant herein appears to have arbitrarily chosen a number which is impermissible. See *In re Rodman*, 106 USPQ 142, 144, 145 (CCPA 1955). Further, in *In re Wertheim*, 209 USPQ 554 (CCPA 1981) (*Wertheim* (II)), the Court held that because the applicant had amended the claims to avoid the prior art to subject matter which although falling within the scope of the broad disclosure of the parent case was not explicitly disclosed in the parent, as such, the same constituted new matter and was not entitled to the priority date of the parent case. *Wertheim* (II) at pg. 565. Similarly in this case, Applicant appears to have amended the claims in an attempt to avoid the prior art to subject matter which was not explicitly disclosed in the Specification. As such, the same constitutes new matter. Similarly, with respect to claims 1-3, 21, 22, the

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limitation “at least twenty percent by weight” does not appear to find any support in the Specification and Applicant has not cited to any disclosure which supports said amendment.

Claim 21 is reject under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 21 claims a product or composition of matter and the method steps of using the product or composition of matter, i.e. leaving on the skin. A single claim which claims both a product or composition of matter and the method steps of using the same is indefinite under 35 U.S.C. 112, second paragraph. See MPEP Section 2173(p)(II).

Claim 21 is also rejected under 35 U.S.C. 101 in that the claim is directed to neither a “process” nor a “composition of matter,” but rather embraces or overlaps two different statutory classes of invention set forth in 35 U.S.C. 101 which is drafted so as to set forth the statutory classes of invention in the alternative only. See MPEP Section 2173.05(p)(II).

***Claim Rejections - 35 USC § 102/103***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

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(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-3,5,7,21,22 are rejected under 35 U.S.C. 102(e) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Messenger (US Pat. 6,290,976).

Messenger expressly discloses a composition comprising corundum powder having size of about 120 FEPA (about 125 microns), mineral oil (56%), moisturizer falling within the scope of applicant's claims (Claims 1-7, Column 3, lines 34-51, Example 1). About 120 FEPA (about 125 microns) is sufficiently specific to the claimed 124 microns such that one of ordinary skill in the art would immediately envisage 124 microns as being about 125 microns.

Alternatively, at the very least the claimed invention is rendered obvious within the meaning of 35 USC 103, because the prior art discloses products and uses that contain the same exact ingredients/components as that of the claimed invention. See *In re Fitzgerald*, 205 USPQ 594 (CCPA 1980). See also *In re May*, 197 USPQ 601, 607 (CCPA 1978).

Examiner has duly considered Applicant's arguments but deems them unpersuasive.

Applicant's rule 131 affidavit is insufficient to overcome the rejection. Applicant's rule 131 affidavit is insufficient to overcome the rejection. Claim 1 requires at least 20% of a moisturizer and a plurality of abrasive particles having a specific size within a claimed range. Claim 5 claims a cream but also requires corundum having an average particle size in the claimed range. Nothing in the exhibit provides facts which sufficiently support the conclusion that the contents of the jars are what is set forth in the claimed invention. The affidavit or declaration and exhibits must clearly explain which facts or data applicant is relying on to show completion of his or her invention prior to the particular date. Vague and general statements in

broad terms about what the exhibits describe along with a general assertion that the exhibits describe a reduction to practice “amounts essentially to mere pleading, unsupported by proof or a showing of facts” and, thus, does not satisfy the requirements of 37 CFR 1.131(b). In re Borkowski, 184 USPQ 29 (CCPA 1974). Applicant must give a clear explanation of the exhibits pointing out exactly what facts are established and relied on by applicant. See 184 USPQ at 33. Further, a rule 131 affidavit cannot be used where the US Patent or US Patent Application claims the same invention. See MPEP 715 [R-1]. Since Applicant’s arguments are solely related to the rule 131 affidavit, Examiner maintains the rejection herein.

Claims 1,2,21,22 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Lee et al. (US Pat. 6,294,179)

Lee et al. expressly discloses a composition comprising calcite having particles sizes falling within the claimed range of 50 to 556 microns, surfactants, hectorite, xanthan gum and water falling within the scope of Applicant’s claims (Column 5, Column 6, lines 1-20).

Alternatively, at the very least the claimed invention is rendered obvious within the meaning of 35 USC 103, because the prior art discloses products and uses that contain the same exact ingredients/components as that of the claimed invention. See In re Fitzgerald, 205 USPQ 594 (CCPA 1980). See also In re May, 197 USPQ 601, 607 (CCPA 1978).

Examiner has duly considered Applicant’s arguments but deems them unpersuasive.

Applicant’s claim does not define what constitutes the moisturizer and Applicant’s Specification appears to indicate that the moisturizer can contain a combination of substances (Paragraphs 0014,0015). The term “moisturizer” means a cosmetic lotion or cream applied to the skin to counter dryness. See The American Heritage Dictionary of the English Language,

Fourth Edition (2000). The carrier in Lee et al. appears to fall within the scope of said definition as it is in the form of a cream or lotion and contains water and it is applied to the skin. Applicant argues that it is unable to discern any part of Lee that teaches or suggests a moisturizer that is 20% percent of the base. However, as indicated above, a moisturizer may be a single compound or a combination of compounds. For example, water clearly provides moisture and is present in an amount greater than 20% and with or without the combination with surfactants, hectorite, xanthan gum appears to fall within the scope of the limitation moisturizer . Therefore, the prior art composition appears to fall within the scope of the claimed invention.

With respect to the limitation “where the composition may be left on the skin after application”, this is an intended use. In fact, it is by the terms of its language an optional intended use. In any case, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. See *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ 458, 459 (CCPA 1963). The burden is on Applicant to show that the prior art composition is not capable of being left on the skin after application.

Claims 1-3, 21,22 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Saperstein (US Pat. 3,092,111) or Stiefel (US Pat. 4,957,747).

Saperstein expressly discloses a composition comprising aluminum oxide having particles sizes falling within the claimed range of 50 to 556 microns, surface-active agent,



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emollient and water falling within the scope of Applicant's claims (Column 6, lines 36-75, Column 7, Columns 13-16, claims 11,12).

Stiefel expressly discloses a composition comprising aluminum oxide having particles sizes falling within the claimed range of 50 to 556 microns, emollients, soap formers and water falling within the scope of Applicant's claims (Column 2, Examples 1,2).

Alternatively, at the very least the claimed invention is rendered obvious within the meaning of 35 USC 103, because the prior art discloses products and uses that contain the same exact ingredients/components as that of the claimed invention. See *In re Fitzgerald*, 205 USPQ 594 (CCPA 1980). See also *In re May*, 197 USPQ 601, 607 (CCPA 1978).

Examiner had duly considered Applicant's arguments but deems unpersuasive for the same reasons as above. Further, the Specification specifically discloses that the moisturizer can include humectants, glycerin, propylene glycol, lanolin, and silicone derivatives. The Saperstein composition contains lanolin, polyethylene glycol, glycerine and water (Column 7, lines 6-10). The Stiefel reference includes polyethylene glycol, dimethicone, glycerine and water (Column 2, lines 15-65). Applicant argues that it is unable to discern any part of the above references that teaches or suggests a moisturizer that is 20% percent of the base. However, as indicated above, a moisturizer may be a single compound or a combination of compounds. For example, water clearly provides moisture and is present in an amount greater than 20% and with or without the combination with the components identified above appears to fall within the scope of the limitation moisturizer. Therefore, the prior art compositions appear to fall within the scope of the claimed invention. Therefore, the prior art compositions fall within the claimed inventions.

For the same reasons as above, the limitation “where the composition may be left on the skin after application” does not appear to patentably distinguish the invention. Again, the burden is on Applicant to show that the prior art compositions are not capable of being left on the skin.

Claims 1-3,5,7,21,22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Imamura et al. (US Pat. 4,284,533).

Imamura et al. teach a composition containing abrasives, such as aluminum oxide and magnesium oxide, wherein the particle size of the abrasive can range from 2 to 150 microns and larger, surfactants, hydrotropes, polyacrylic acid (Column 1, lines 65-68, Column 2, Column 3, lines 36-45).

The difference between the prior art and the claimed invention is that the prior art does not expressly disclose using abrasive particles in the range of 50 microns to 556 microns or 34 to 124 microns. However, the prior art amply suggests the same as it is known to use abrasive particles overlapping said range. As such, it would have been well within the skill of an ordinary skill in the art would have been motivated to modify the prior art as above depending on the desired abrasiveness of the composition.

Therefore, the claimed invention, as a whole, would have been *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, because every element of the invention has been taught by the teachings of the cited reference.

Examiner has duly considered Applicant's arguments but deem them unpersuasive for the same reasons as above. Further, the Specification specifically discloses that the moisturizer can include humectants and propylene glycol. Imamura et al. discloses the use of glycols and glycol ethers. Further, the amount of water in the compositions is greater than 20%. As such, the prior

art teaches the use of substances which appear to meet the definition of "moisturizer" set forth in the Specification as well as the amount required in the claims. Further, for the same reasons as above, the limitation indicating that the composition may be left on the skin does not patentably distinguish the claimed invention. With respect to the limitation "cream", the term "cream" is not defined by the Specification. As such, the fact that the reference teaches a viscosity of less than 5000 cps does not appear to teach away from the claimed invention. Applicant cites to article defining a cream as having a viscosity greater than 30,000 cps. However, no such article was attached and Examiner was unable to obtain the article using the web address cited. In any case, Applicant has made no showing that the FDA definition was what was contemplated at the time the Application was filed. See also US Pat. 6,284,257 (Examples 1, 3, disclosing creams having viscosities of less than 5000 cps).

Claims 5,7 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fox et al. (US 2002/0090385).

Fox et al. discloses a portable, inexpensive, easy to use microdermabrasion composition containing aluminum oxide having particles sizes of about 40 microns or about 100 microns in a cream carrier which holds the aluminum oxide crystals and can contain Vitamin C, Vitamin E and moisturizers as desired to be used in the cosmetic (Paragraphs 0005,0012,0013, 0024,0025,0026,0027,0028, Claims 1-7).

The difference between the prior art and the claimed invention is that the prior art does not expressly disclose a composition in the form of a cream having corundum suspended in the base with an average particle size of less than 125 microns. However, the prior art amply suggests the same as the prior art discloses the incorporation of aluminum oxide crystals in a

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cream and particles sizes of about 40 and about 100 microns and additionally adding other substances such as Vitamin C, Vitamin E and moisturizers. As such, the claimed invention would have been well within the skill of and one of ordinary skill in the art would have been motivated to modify the prior art as above with the expectation that the cream carrier would hold the aluminum oxide crystals, that other substances which are known to be used in cosmetics, such as vitamins and moisturizers, could be added as desired, that the composition would be portable, inexpensive and easy to use, and that the size of the particles could be varied depending on the desired abrasiveness of the composition.

Therefore, the claimed invention, as a whole, would have been *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, because every element of the invention has been taught by the teachings of the cited reference.

Examiner has duly considered Applicant's arguments but deems them unpersuasive.

Applicant's rule 131 affidavit is insufficient to overcome the rejection. Claim 1 requires at least 20% of a moisturizer and a plurality of abrasive particles having a specific size within a claimed range. Claim 5 claims a cream but also requires corundum having an average particle size in the claimed range. Nothing in the exhibit provides facts which sufficiently support the conclusion that the contents of the jars are what is claimed. The affidavit or declaration and exhibits must clearly explain which facts or data applicant is relying on to show completion of his or her invention prior to the particular date. Vague and general statements in broad terms about what the exhibits describe along with a general assertion that the exhibits describe a reduction to practice "amounts essentially to mere pleading, unsupported by proof or a showing of facts" and, thus, does not satisfy the requirements of 37 CFR 1.131(b). In re Borkowski, 184

USPQ 29 (CCPA 1974). Applicant must give a clear explanation of the exhibits pointing out exactly what facts are established and relied on by applicant. See 184 USPQ at 33. Since Applicant's arguments are solely related to the rule 131 affidavit, the rejection is maintained herein.

Claims 1-3,5,7,21,22 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Wise (US Pat. 5,219,571).

Wise expressly discloses bentonite having a particle size of about 100 up to 500 microns in a lipophilic carrier, such as USP cold cream, petroleum jelly, mineral oil, propylene glycol, glycerin, Aquaphor®, Eucerin®, lanolin, hydrocarbons, waxes in an amount of 20% to 80% (Column 3, Claims 1,2) falling within the scope of the claims. Bentonite contains aluminum oxide and magnesium oxide (Column 2, lines 40-58).

Alternatively, at the very least the claimed invention is rendered obvious within the meaning of 35 USC 103, because the prior art discloses products and uses that contain the same exact ingredients/components as that of the claimed invention. See *In re Fitzgerald*, 205 USPQ 594 (CCPA 1980). See also *In re May*, 197 USPQ 601, 607 (CCPA 1978).

Claims 1-3,5,7,21,22 are rejected under 35 U.S.C. 103(a) as obvious over McAtee et al. (US Pat. 5,607,980).

McAtee et al. discloses a composition which is useful for application to human skin for conditioning, desquamating, treating dry skin and in cleansing embodiments for cleansing the skin without over-drying or irritating the skin (Column 3, lines 44-49). It is taught that the composition can be in the form of a cream (Column 4, lines 3-6). It is taught that the composition contains one or more humectants or moisturizers, including in an amount of about 20%, such as

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lactic acid, aloe, glycerol, propylene glycol and insoluble particles which act to enhance the cleansing effect of the composition and have a particle size of about 75 up to about 400 microns and include aluminum oxide, montmorillonite, hectorite (Columns 14, 15).

The difference between the prior art and the claimed invention is that the prior art does not expressly disclose a composition comprising at least twenty percent by weight moisturizer and a plurality of abrasive particles in the range of 50 microns to 556 microns or a cream having corundum having particles sizes from 34 to 124 microns. However, the prior art amply suggests the same as it is known to use humectants or moisturizers in an amount of about 20% in topical compositions for conditioning, desquamating, treating dry skin and cleansing the skin, to formulate the same in a cream and to use insoluble particles having sizes with the claimed ranges to enhance the cleansing effect. As such, it would have been well within the skill of and one of ordinary skill in the art would have been motivated to modify the prior art as above with the expectation of formulating a skin cleanser which does not over-dry the skin.

Therefore, the claimed invention, as a whole, would have been *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, because every element of the invention has been taught by the teachings of the cited reference.

#### **Conclusion**

A facsimile center has been established in Technology Center 1600. The hours of operation are Monday through Friday, 8:45 AM to 4:45 PM. The telecopier number for accessing the facsimile machine is (703) 872-9306.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Frank Choi whose telephone number is (571)272-0610. Examiner maintains a flexible schedule. However, Examiner may generally be reached Monday-Friday, 8:00 am – 5:30 pm (EST), except the first Friday of the each biweek which is Examiner's normally scheduled day off.

If attempts to reach the Examiner by telephone are unsuccessful, the Examiner's Supervisor, Mr. Thurman Page, can be reached at (571)272-0602. Additionally, Technology Center 1600's Receptionist and Customer Service can be reached at (703) 308-1235 and (703) 308-0198, respectively.

FIC

March 6, 2004



**S. MARK CLARDY  
PATENT EXAMINER  
GROUP 1200**